Supreme Court, U.S.
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No. 96-353

In The

Supreme Court of the United States

October Term, 1996

GEORGE GREEN,

Petitioner,

vs.

PHOENIX INSTITUTE FOR RESEARCH AND EDUCATION, LTD., a Nevada Corporation,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Respondent requests that the Court deny the petition for writ of certiorari seeking review of an order of the Supreme Court of the State of Nevada.

STATEMENT OF JURISDICTION

This Court should not exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). All of the alleged federal questions were rendered moot by the decision of the Nevada Supreme Court on other grounds and there are no special or important reasons raised in the Petition.

STATEMENT OF THE CASE

Respondent respectfully opposes the petition for writ of certiorari which, in effect, is requesting that this Court allow Petitioner to keep the gold coins that he embezzled instead of returning them to their rightful owner. The statement of the case is succinctly and eloquently set forth in the Nevada Supreme Court's January 4, 1996 *per curiam* Order Dismissing Appeal, a copy of which has already been identified as pages 8-12 of Petitioner's petition for writ of certiorari filed herein on September 9, 1996. In particular, pages 8 and 9 of Petitioner's Appendix are most cogent. Petitioner embezzled the gold coins intended for Respondent by hiding some of the gold coins in his home and burying the remainder of the gold coins in his backyard. Incredulously, Petitioner claims that because the donor was awarded the gold coins, which comprised the intended gift, which was never consummated by delivery to Respondent because of Petitioner's embezzlement, the failed gift has been mistakenly ordered to be returned to its rightful owner. Thus, Petitioner faults the Nevada Supreme Court for not condoning the embezzlement perpetrated upon the donor by Petitioner as the constructive trustee of the embezzled gold coins.

Petitioner did testify at trial, and his testimony put the proverbial noose around his own neck, as will be seen below. Petitioner himself was heard at trial to admit that he was holding the gold coins as trustee, and not as its rightful owner.

A. Course of Proceedings and Disposition of the Case Below.

Petitioner's version of the statement of the case is inaccurate and misleading, because it fails to include pertinent information, information that was duly noted in the Nevada Supreme Court's Order Dismissing Appeal (Petitioner's Appendix 8-12). It should have been disclosed by Petitioner that Petitioner filed a counterclaim in May 1993 (2 ROA 384-388)[1] that was dismissed almost a year before trial (4 ROA 1280-1282). It should also have been disclosed that the donor and alleged missing indispensable party, David Overton, testified at trial, along with Petitioner, E. J. Ekker, the president of Respondent, and another witness, Leon Fort (11 ROA 1-130; 12 ROA 131-366). At trial Petitioner testified that he was trustee for the gold coins (12 ROA 132-238). Petitioner having admitted that he was the trustee for the intended gold gift which was intended by the donor to be given to another, could not undo by any stretch of the imagination the consequences of his embezzlement of the coins. Petitioner failed to disclose his receipt of the gold on behalf of Respondent and told no one about the gold (12 ROA 289-290). Further, Petitioner did not send a thank you letter, confirmation letter, or receipt to the donor (11 ROA 46; 12 ROA 145). Petitioner's own testimony at trial also included the following contradictory statements: (1) The gold was not delivered to the non-profit corporation (12 ROA 137); (2) The gift was incomplete (12 ROA 137-138); (3) Initially, Petitioner's

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1. "ROA" refers to Record on Appeal including transcripts of proceedings (volumes 8-12), pleadings, other papers filed with the trial court (volumes 1-7), as set forth in the clerk's transcript dated December 9, 1994.

intention was to keep the gold and give it to a non-profit corporation when it was formed (12 ROA 137, 241); (4) Petitioner decided to keep the gold for himself (11 ROA 108; 12 ROA 139); (5) Petitioner held the gold as collateral (11 ROA 107-108; 12 ROA 200); (6) The gold was given to Petitioner and his wife, but primarily to Petitioner (11 ROA 108; 12 ROA 244; Exhibit 16); (7) Petitioner accepted the gold as a gift (11 ROA 109); and (8) Petitioner was a trustee for the gold coins, yet he never took an inventory of them (12 ROA 132, 139, 140, 238).

One of the more salient facts is the donor's testimony at trial emphasizing that the gold was never meant for Petitioner (11 ROA 41, 52). Such testimony was as follows: "I felt betrayed in my own mind because I intended those coins to be sent as a gift to the Institute, certainly not to Mr. George Green himself." (11 ROA 52).

Petitioner does correctly note that the federal questions were not raised until after the case was dismissed by the trial court.

B. Correction of Misstatements in the Petition.

The opinion of the Nevada Supreme Court in ordering dismissal of the appeal correctly sets forth **all** of the cogent facts of this case. The opinion accurately reflects the embezzlement by Petitioner, who had represented himself to the donor to be an officer and trustee of Respondent. Petitioner hid the gold coins from Respondent and never delivered them to Respondent as the intended donee. For the sake of brevity Respondent respectfully directs the Court's attention to page 1 of such Order Dismissing Appeal (Petitioner's Appendix 8) where it states:

> This is an appeal from an order of the district court dismissing respondent's complaint.

> During 1991, appellant George Green ("Green") received four shipments of gold coins from David Overton ("Overton") which were meant to be donated to respondent Phoenix Institute for Research and Education, a Nevada corporation ("Phoenix"). Overton donated the gold coins to Phoenix in order to assist Phoenix in publishing some of its publications, Green, representing himself to Overton as an officer or trustee of Phoenix, did not deliver the gold coins to Phoenix. Instead, after moving to Gardnerville, Nevada, Green hid some of the gold coins in his home and buried the remainder of the gold coins in his back yard.

These facts disclose the misrepresentations and half-truths set forth in paragraph 5 on page 4 of the Petition filed herein on September 9, 1996. Petitioner's statements falsely imply Petitioner was the intended donee and that Respondent was somehow aware of Petitioner's embezzlement of the gift. Petitioner also falsely implies that Respondent was aware of the embezzlement and allowed it to persist, only to seek such gift after Petitioner expended further funds. Pursuant to United States Supreme Court Rule 15.1, Respondent brings the foregoing to the Court's attention.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS NEVER OWNED THE GOLD COINS HE EMBEZZLED.

The facts disclosed hereinabove, including Petitioner's own trial testimony, show that Petitioner has never owned the gold coins which he embezzled. This Court does not grant a certiorari to review evidence and discuss specific facts, *United States v. Johnston,* 268 U.S. 220, 227 (1925). Petitioner has never proffered any evidence or law that would show why as an embezzler he would be entitled to a hearing to retain the embezzled gold coins instead of returning them to the donor, David Overton. The Nevada Supreme Court upheld the trial court's decision based in part upon Petitioner's admissions in his trial testimony that a constructive trust was created upon state grounds in which Petitioner as constructive trustee held legal title for the donor and constructive trustor and beneficiary, *Locken v. Locken,* 98 Nev. 369, 372, 650 P.2d 803, 804-805 (1982). It also concluded that no hearing was necessary in order to return the property to the constructive trustor, *also citing Locken v. Locken* at page 372, 650 P.2d at 805 (Petitioner's Appendix, page 10).

II.

THE DONOR WAS NOT PREJUDICED BY FAILING TO APPEAR AS A PARTY.

The return of the gold coins to the nonparty donor was an equitable result. For reasons which remain unknown, Petitioner is claiming the rights of the donor were violated by returning the incompleted gold coins gift to him. Although the donor was

not a party, he did testify that Petitioner had betrayed him by failing to deliver the gold coins to Respondent. The only equitable thing to do was to return the gold coins to the donor, rather than allowing the embezzler to keep them. The Nevada Supreme Court so opined when it concluded on state grounds that the donor was not an indispensable party to this action. It cited *Howard v. Dallio*, 815 pl.2d 1150, 1152 (Mont. 1991), 7.6 Am. Jur. 2d *Trusts* § 215 (1992), and *Locken v. Locken, supra* 98 Nev. at 372, 650 P.2d at 805, again for the proposition that the construction of the constructive trust was necessary to prevent an inequitable result.

This Court has previously stated:

> The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result . . . [The] rule established by these authorities . . . illustrates the diligence with which courts of equity will seek a way to adjudicate the merits of a case in the absence of interested parties who cannot be brought in. Bourdier v. Pacific Western Oil Co., 57 S. Ct. 51, 53 299 U.S. 65, 70-71, 81 L. Ed 42 (1936).

Petitioner has failed to explain why with ample opportunity to do so he never brought the donor in as a party in a third party complaint. It is highly suspect that Petitioner, having embezzled the gold coins of the donor is now concerned about the unsubstantiated prejudice to the donor in not letting Petitioner keep the gold coins that he embezzled. The donor testified in person at the trial, but Petitioner's counsel never questioned him

about the prejudice to the donor on account of not appearing as a party, claimed by Petitioner for the first time after trial.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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